Supreme Court, U.S.
FILED

95-504 SEP 20 1995

OFFICE OF THE CLERK

Case No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

vs.

CARLOS MIRAGAYA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT AND APPENDIX

ROBERT A. BUTTERWORTH
Attorney General of Florida

SUSAN D. DUNLEVY
Assistant Attorney General
DEPARTMENT OF LEGAL AFFAIRS
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

Counsel for Petitioner

QUESTION PRESENTED FOR REVIEW

WHETHER THE LOWER COURT'S HOLDING THAT THE RENTAL OF A VIDEOTAPE BY AN UNDERCOVER LAW ENFORCEMENT OFFICER FROM A VIDEOTAPE RENTAL BUSINESS AND THE COPYING OF SUCH TAPE FOR USE IN A CRIMINAL PROSECUTION CONSTITUTES A SEARCH OR A SEIZURE WITHIN THE MEANING OF THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES IS IN CONFLICT WITH THIS COURT'S HOLDING IN *MARYLAND V. MACON*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985).

TABLE OF CONTENTS

Page

QUESTION PRESENTED FOR REVIEW i

TABLE OF CONTENTS ii

OPINIONS BELOW 1

JURISDICTION OF THE COURT 2

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 3

STATEMENT OF THE CASE 8

REASONS FOR GRANTING THE WRIT 11

THIS COURT'S OPINION IN *MARYLAND V. MACON*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), COUPLED WITH THE CASE LAW ON FAIR USE OF COPYRIGHTED MATERIAL, CLEARLY ESTABLISHES THAT NEITHER A SEARCH NOR A SEIZURE OCCURRED HERE WITHIN THE MEANING OF THE FIRST AND FOURTH AMENDMENTS. 11

CONCLUSION 17

OPINION OF THE DISTRICT COURT OF APPEAL OF FLORIDA, SECOND DISTRICT A-1

ORDER OF THE SUPREME COURT OF FLORIDA DENYING REVIEW A-5

TABLE OF CITATIONS

Page

Carlisle v. State ex rel Smith,
319 So. 2d 624 (Fla. 4th DCA 1975) 16

Harper & Row v. Nation Enterprises,
471 U.S. 539, 105 S. Ct. 2218, 85 L. Ed. 2d 588 (1985) 13,15

Hustler Magazine, Inc. v. Moral Majority, Inc.,
796 F.2d 1148 (9th Cir. 1986) 14, 15

Jartech, Inc. v. Clancy,
666 F.2d 403 (9th Cir.), *cert. denied*,
459 U.S. 826, 879, 103 S. Ct. 58, 59, 175,
74 L. Ed. 2d 62, 143 (1982) 13, 14

Ladoga Canning Corp. v. McKenzie,
370 So. 2d 1137 (Fla. 1979) 16

Maryland v. Macon,
472 U.S. 463, 105 S.Ct. 2778, 86 L.Ed.2d 370 (1985) 9-12,16

Miller v. California,
413 U.S. 15, 93 S. Ct. 2607, 37 L. Ed. 2d 419 (1973) 15, 16

Perez v. State,
620 So. 2d 1256 (Fla. 1993) 11

Religious Technology Center v. Wollersheim,
971 F.2d 364 (9th Cir. 1992) 13, 14

Soldal v. Cook County,
506 U.S. ___, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992) . 12

Sony Corp. v. Universal City Studios,
464 U.S. 417, 104 S. Ct. 774, 78 L. Ed. 2d 574 (1984) .. 13-15

Stall v. State,
570 So. 2d 257 (Fla. 1990),
cert. denied sub nom., Long v. Florida,
501 U.S. 1250, 111 S.Ct. 2888, 115 L.Ed.2d 1054 (1991) 9

OTHER AUTHORITIES CITED

17 U.S.C. § 106 12

17 U.S.C. § 107 ..... 13, 14

3 NIMMER ON COPYRIGHT § 13.05[D] (1991) 14

Article I, Section 12, Florida Constitution 11

Section 847.011, Florida Statutes (1991) 8, 15, 16

Case No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

vs.

CARLOS MIRAGAYA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

OPINIONS BELOW

The opinion of the Florida Second District Court of Appeal in *Miragaya v. State* is reported at 654 So. 2d 262 (Fla. 2d DCA 1995). It is reproduced in the appendix at A - 1, et seq.

JURISDICTION OF THE COURT

On April 28, 1995, the Florida Second District Court of Appeal granted a petition for writ of certiorari filed by a criminal defendant, charged in state court with several misdemeanor counts of distribution of obscene material and possession of obscene material with intent to distribute, who had sought suppression of the evidence against him on the ground that it had been illegally seized in contravention of the Fourth Amendment to the Constitution of the United States. Discretionary review by the Supreme Court of Florida was timely sought, but was denied on June 23, 1995. This Petition for Writ of Certiorari was filed within ninety (90) days of the latter date. The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C. §1651.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1ST AMENDMENT to the CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

4TH AMENDMENT to the CONSTITUTION OF THE UNITED STATES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized.

SECTION 4 of the FLORIDA CONSTITUTION

Every person may speak, write and publish his sentiments on all subjects but shall be responsible for the abuse of that right. No law shall be passed to restrain or abridge the liberty of speech or of the press. In all criminal prosecutions and civil actions for defamation the truth may be given in evidence. If the matter charged as defamatory is true and was published with good motives, the party shall be acquitted or exonerated.

SECTION 12 of the FLORIDA CONSTITUTION

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, and against the unreasonable interception of private communications by any means, shall not be violated. No warrant shall be issued except upon probable cause, supported by affidavit, particularly describing the place or places to be searched, the person or persons, thing or things to be seized, the communication to be intercepted, and the nature of evidence to be obtained. This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court. Articles or information obtained in violation of this right shall not be admissible in evidence if such articles or information would be inadmissible under decisions of the United States Supreme Court construing the 4th Amendment to the United States Constitution.

17 U.S.C. § 106

Subject to sections 107 through 118, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or

sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 107

Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;

(2) the nature of the copyrighted work;

(3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and

(4) the effect of the use upon the potential market for or value of the copyrighted work.

The fact that a work is unpublished shall not itself bar a finding of fair use if such finding is made upon consideration of all the above factors.

SECTION 847.011(1)(a), Florida Statutes (1991)

Any person who knowingly sells, lends, gives away, distributes, transmits, shows, or transmutes, or offers to sell, lend, give away, distribute, transmit, show, or transmute, or has in his possession, custody, or control with intent to sell, lend, give away, distribute, transmit, show, transmute, or advertise in any manner, any obscene book, magazine, periodical, pamphlet, newspaper, comic book, story paper, written or printed story or article, writing, paper, card, picture, drawing, photograph, motion picture film, figure, image, phonograph record, or wire or tape or other recording, or any written, printed, or recorded matter of any such character which may or may not require mechanical or other means to be transmuted into auditory, visual, or sensory representations of such character, or any article or instrument for obscene use, or purporting to be for obscene use or purpose; or who knowingly designs, copies, draws, photographs, poses for, writes, prints, publishes, or in any manner whatsoever manufactures or prepares any such material, matter, article, or thing of any such character; or who knowingly writes, prints, publishes, or utters, or causes to be written, printed, published, or uttered, any advertisement or notice of any kind, giving information, directly or indirectly, stating, or purporting to state, where, how, of whom, or by what means any, or what purports to be any, such material, matter, article, or thing of any such character can be purchased, obtained, or had; or who in any manner knowingly hires, employs, uses, or permits any person knowingly to do or assist in doing any act or thing mentioned above, is guilty of a misdemeanor of the first degree, punishable as provided in Sec. 775.082 or Sec. 775.083. A person who, after having been convicted of a violation of this subsection, thereafter violates any of its provisions, is guilty of a felony of the third degree, punishable as provided in Sec. 775.082, Sec. 775.083, or Sec. 775.084.

SECTION 847.011(7), Florida Statutes (1991)

There shall be no right of property in any of the materials, matters, articles, or things possessed or otherwise dealt with in violation of this section; and, upon the seizure of any such material, matter, article, or thing by any authorized law enforcement officer, the same shall be held by the arresting agency. When the same is no longer required as evidence, the prosecuting officer or any claimant may move the court in writing for the disposition of the same and, after notice and hearing, the court, if it finds the same to have been possessed or otherwise dealt with in violation of this section, shall order the sheriff to destroy the same in the presence of the clerk; otherwise, the court shall order the same returned to the claimant if he shows that he is entitled to possession. If destruction is ordered, the sheriff and clerk shall file a certificate of compliance.

STATEMENT OF THE CASE

The instant case arose in county court, where Respondent was charged with six (6) misdemeanor counts of distribution (three (3) counts) and possession with intent to distribute (three (3) counts) of obscene material, in violation of Section 847.011(1)(a), Florida Statutes (1991). He filed a motion to suppress the physical evidence against him, to wit: the three videotapes alleged to be the obscene material in question, arguing that the warrantless "seizure" by law enforcement when undercover deputies copied his videotapes was in violation of "the First and Fourth Amendments to the United States and Florida Constitutions" (R 74). The State's position was that no search and no seizure had occurred in this case.

The facts underlying Respondent's motion to suppress were that two undercover sheriff's deputies went to C & M Home Video, a store owned by Respondent, and rented three videotapes. They returned the tapes to Respondent's store before the end of the agreed 24-hour rental period, but, before doing so, they made two copies of each of the three videotapes, giving one copy of each to the State Attorney's Office and the other to the Sheriff's Office evidence custodian (T 9). The evidence that the only purpose in copying Respondent's tapes was for use in a trial or evidentiary proceeding relating to criminal charges against Respondent for renting out obscene material and that no other use of the videotape copies was made (T 5, 12) was uncontroverted. After review of the videotape copies by an Assistant State Attorney, criminal charges were filed against Respondent.

Although no evidence to this effect was adduced, defense counsel stated in his argument to the trial court that, after the charges had been filed, Respondent had removed the videotapes in issue from his shelves "for fear of further prosecution if he continued to rent the material" (T 24). The prosecutor responded that Respondent's removal of the allegedly obscene videotapes from rental availability was his choice, that no attempt had been made by law enforcement

or by the State Attorney's office to restrain Respondent from disseminating the videotapes in question prior to a judicial determination as to whether or not they were obscene (T 33).

No evidence of the extent of Respondent's rights under federal copyright law was presented to the trial court.

The trial court granted Respondent's motion to suppress because "it is clear that the Supreme Court of the United States has consistently held that rigorous procedural safeguards must be employed before expressive materials can be seized as obscene," and, in the trial court's view a seizure had occurred here without implementation of the required safeguards. The trial court found this Court's opinion in *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), to be factually distinguishable because the defendant in *Macon* had sold all of his rights in the materials in question, whereas Respondent here retained a possessory interest in his videotapes and a "reasonable expectation of privacy...that that material would be returned to him."

The State appealed to the circuit court, which held that there had been neither an illegal search nor an illegal seizure in this case and therefore reversed, relying primarily on *Macon* and on the Florida Supreme Court's holding in *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom., Long v. Florida*, 501 U.S. 1250, 111 S. Ct. 2888, 115 L. Ed. 2d 1054 (1991), that the right to privacy under the Florida Constitution does not apply to vendors of obscene materials.

Respondent then filed a petition for writ of common law certiorari with the Second District Court of Appeal. In that petition, Respondent posed two issues: (1) whether owners of video rental businesses have a reasonable expectation of privacy in the material that they rent out, and (2) whether law enforcement officers can seize allegedly obscene material from a commercial business without a warrant or a judicial determination that the material is, in fact, obscene. Petitioner's response relied primarily on *Macon* and *Stall* for its negative response to the first issue posed by Respondent. As to the second issue, Petitioner denied that either a search or

a seizure had occurred at all under the undisputed facts in this case, relying primarily on *Macon* and federal copyright law, including the fair use doctrine.

The Second District Court of Appeal's opinion ignored the *Macon* case, relied on two of this Court's cases in which the fact of the seizure of the materials in question was undisputed, and concluded that a seizure had occurred here in violation of the First and Fourth Amendments to the United States Constitution. The Second District did not address Respondent's first issue.

REASONS FOR GRANTING THE WRIT

THIS COURT'S OPINION IN *MARYLAND V. MACON*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), COUPLED WITH THE CASE LAW ON FAIR USE OF COPYRIGHTED MATERIAL, CLEARLY ESTABLISHES THAT NEITHER A SEARCH NOR A SEIZURE OCCURRED HERE WITHIN THE MEANING OF THE FIRST AND FOURTH AMENDMENTS.

Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985), held that entry into a business and examination of materials offered for sale does not constitute a search and that the purchase of one or more of the items offered for sale does not constitute a seizure within the meaning of the Fourth Amendment to the Constitution of the United States.[1]

---

[1]It is clear that the decision of the Second District Court of Appeal was based solely on its interpretation of search and seizure law under the Fourth Amendment to the United States Constitution. Furthermore, the Second District's decision could not conceivably be grounded on state law inasmuch as the provision of the Florida Constitution proscribing unreasonable searches and seizures is Article I, Section 12, which provides in pertinent part: "The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures,...shall not be violated....*This right shall be construed in conformity with the 4th Amendment to the United States Constitution, as interpreted by the United States Supreme Court.*" (Emphasis supplied.) The Florida Supreme Court has interpreted this provision to mean that the state courts of Florida are "bound to follow the United States Supreme Court's interpretations of the Fourth Amendment and to provide no greater protection than those interpretations." *Perez v. State*, 620 So. 2d 1256, 1258 (Fla. 1993).

Petitioner agrees that, under *Maryland v. Macon*, a "seizure occurs when 'there is some meaningful interference with an individual's possessory interests' in the property seized." 472 U.S. at 469, 86 L. Ed. 2d at 470. Petitioner further recognizes that the Fourth Amendment guarantee against unreasonable seizures protects property interests even in the absence of a privacy interest. *E.g., Soldal v. Cook County*, 506 U.S. ___, 113 S. Ct. 538, 121 L. Ed. 2d 450 (1992). However, there was no meaningful interference with Respondent's property interests here.

It is undisputed that the undercover officers here returned the tapes they rented within 24 hours, in accordance with the rental agreement. Accordingly, Respondent was no more deprived of his possessory interests in the "original" tapes that he rented out than was the bookstore owner in *Maryland v. Macon*.

It must also be made clear that there was no prior restraint here. The videotapes rented from Respondent were returned within the contractually agreed-upon period, and there is no evidence that Respondent's removal of the tapes in question from his shelves was anything but a voluntary decision on his part. There is no evidence that he was told by any judge or law enforcement officer not to rent these tapes out prior to the making of a determination as to whether or not they were obscene after a trial or adversary hearing and no evidence that he was threatened by any judge, law enforcement officer, or State Attorney's Office employee or staff member with additional criminal charges if he rented out any of the videotapes in issue prior to a proper judicial determination as to whether or not they were obscene.

Thus, the only property right that could possibly have been violated here would be any right that Respondent might have under federal copyright law, specifically, 17 U.S.C. § 106. However, no evidence of the extent of Respondent's rights under the copyright law was presented to the trial court. Presumably Respondent was not the creator of

any of the videos; therefore, he has failed to demonstrate that he has standing to raise any copyright infringement claim. *See Sony Corp. v. Universal City Studios*, 464 U.S. 417, 434, 104 S. Ct. 774, 78 L. Ed. 2d 574, 587 (1984).

However, assuming arguendo that Respondent did have any rights that would be protected under copyright law that could render the copying of a rented videotape by one of his patrons unauthorized and actionable, those rights are limited by the "fair use" doctrine, codified in 17 U.S.C. § 107, which provides in pertinent part:

> [T]he fair use of a copyrighted work, including such use by reproduction in copies or phonorecords...for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include—
>
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> (2) the nature of the copyrighted work;
>
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> (4) the effect of the use upon the potential market for or value of the copyrighted work....

The enumerated factors are not, however, intended to be exhaustive or exclusive. *Harper & Row v. Nation Enterprises*, 471 U.S. 539, 560-561, 105 S. Ct. 2218, 85 L. Ed. 2d 588, 607 (1985).

A federal court has held in at least two cases, *Jartech, Inc. v. Clancy*, 666 F.2d 403 (9th Cir.), *cert. denied*, 459 U.S. 826, 879, 103 S. Ct. 58, 59, 175, 74 L. Ed. 2d 62, 143 (1982), and *Religious Technology Center v. Wollersheim*, 971 F.2d

364 (9th Cir. 1992), that copying copyrighted material solely for use in litigation constitutes fair use, and the latter opinion quotes as follows from 3 NIMMER ON COPYRIGHT § 13.05[D] at 13-91 (1991): "[W]orks are customarily reproduced in various types of judicial proceedings, including obscenity and defamation actions...and it seems inconceivable that any court would hold such reproduction to constitute [copyright] infringement either by the government or by the individual parties responsible for offering the work in evidence." 971 F. 2d at 367. Since the uncontroverted testimony before the trial court was that the copies made in the instant case were made solely for use in the instant litigation and there was no evidence that they were actually used for any other purpose by anyone, the making of these copies was therefore fair use.

The same conclusion can be reached by considering all of the factors set forth in 17 U.S.C. § 107. As to the first factor, the use was for a nonprofit purpose, the preservation of evidence in a criminal investigation, and not for commercial exploitation. This use could also be considered a species of time shifting, which, in itself, was recognized as a fair use by the United States Supreme Court in *Sony*. The case law makes it clear that, despite the language of the statute, a nonprofit purpose need not be educational. *Sony; Jartech; Wollersheim*.

As to the second factor, the nature of the copyrighted work here (assuming arguendo that it was, in fact, copyrighted) is more creative than informational. The creative nature of the material means that the scope of fair use in this case is less than the scope of fair use for informational works, but this conclusion is not determinative of the ultimate question of whether law enforcement infringed on Respondent's property rights here. *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148 (9th Cir. 1986).

As to the third factor, the amount and substantiality of the portion of the materials in issue that were copied, the videotapes here were copied in their entirety. However, this

fact is not determinative either. In determining whether a film or other creative work is obscene, the trier of fact must consider, inter alia, "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Miller v. California*, 413 U.S. 15, 24, 93 S. Ct. 2607, 37 L. Ed. 2d 419, 431 (1973) (emphasis supplied). Accordingly, given the purpose of the copying involved here, it was absolutely necessary that the videotapes be copied in their entirety. Furthermore, it has been held that even the copying of an entire work can be fair use, *Sony*, even where a profit motive is involved, *Hustler*.

Finally, as to the fourth factor, the effect of the use on the potential market for or the value of the work, which has been held to be "undoubtedly the single most important element of fair use," *Harper & Row*, 471 U.S. at 566, 85 L. Ed. 2d at 611 (1985), because the distribution and use of the copies here was limited to distribution to the State Attorney's Office and, potentially, a showing of the copies to a judge and perhaps also to a jury for a determination of whether the videotapes in question were obscene, any diminution in the market for these works by virtue of their being viewed for free by people who might otherwise have rented a copy of one or more of them from Respondent is minimal in terms of the number of potential lost customers alone. *See Sony; Hustler*. Moreover, State Attorney's Office staff, judges, and jurors in a criminal obscenity case would probably not be counted among Respondent's patrons. *See Hustler*, 796 F. 2d at 1156.

Of course, Respondent could logically argue that, in the event of a determination that any of the videotapes in question was obscene, the marketability of that tape or tapes would be completely eliminated. However, at that point, Respondent would have no property interest whatsoever in the tapes. Under Section 847.011(7), Florida Statutes (1991), there is no property right in obscene materials. Obscene materials are not protected by the First Amendment, and distribution of them, once they have been judicially determined to be obscene following a trial or adversary hear-

ing, may be enjoined, *Miller v. California; Ladoga Canning Corp. v. McKenzie*, 370 So. 2d 1137 (Fla. 1979). Materials that have been properly determined to be obscene may also be destroyed. § 847.011(7); *Carlisle v. State ex rel Smith*, 319 So. 2d 624 (Fla. 4th DCA 1975). Inasmuch as Respondent has been neither prevented from renting out any of his copies of the tapes in question nor unlawfully coerced by illegal court order or threat from law enforcement or any other governmental authority into refraining from renting them out prior to a proper judicial determination as to whether or not they are obscene, the copying of the tapes in issue by the undercover officers here has, to date, not affected the marketability of the tapes owned by Respondent, and Respondent has no cognizable property interest in them once they are determined to be obscene after a trial or adversary hearing, should such a determination ultimately be made.

The bottom line is that there was no seizure here: The undercover officers had a right to rent the videotapes in question and further had a right under the fair use doctrine to copy those tapes for use as evidence in litigation against Respondent. What they did did not constitute a restraint upon Respondent prior to an adversary determination of whether or not the videotapes in question constituted obscene material. There was no violation of Respondent's rights under either the First or the Fourth Amendment. The circuit court below therefore correctly reversed the trial court's finding of an illegal seizure and consequent suppression of the tapes, and the Second District Court of Appeal failed to correctly apply controlling United States Supreme Court precedent. The resulting conflict with *Maryland v. Macon* is intolerable, and this Honorable Court should grant the instant petition for writ of certiorari in order to resolve this conflict.

CONCLUSION

Based on the foregoing facts, argument, and citations of authority, Petitioner respectfully requests that this Court grant the petition for writ of certiorari and reverse the decision of the Florida Second District Court of Appeal.

Respectfully submitted,

ROBERT A. BUTTERWORTH
Attorney General of Florida

SUSAN D. DUNLEVY
Assistant Attorney General
DEPARTMENT OF LEGAL AFFAIRS
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

Counsel for Petitioner

Case No. _____

IN THE

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

vs.

CARLOS MIRAGAYA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE DISTRICT COURT OF APPEAL OF THE STATE OF FLORIDA, SECOND DISTRICT

APPENDIX

ROBERT A. BUTTERWORTH
Attorney General of Florida

SUSAN D. DUNLEVY
Assistant Attorney General
DEPARTMENT OF LEGAL AFFAIRS
2002 North Lois Avenue, Suite 700
Tampa, Florida 33607-2366
(813)873-4739

Counsel for Petitioner

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

CARLOS MIRAGAYA,

Petitioner,

v. CASE NO. 94-03020

STATE OF FLORIDA,

Respondent.

Opinion filed April 28, 1995.

Petition for Writ of Certiorari to the Circuit Court for the Twentieth Judicial Circuit for Collier County; sitting in its appellate capacity.

Donald P. Day,
Berry & Day P.A.,
Naples, for Petitioner.

Robert A. Butterworth,
Attorney General, Tallahassee,
and Susan D. Dunlevy,
Assistant Attorney General,
Tampa, for Respondent.

RYDER, Acting Chief Judge.

Carlos Miragaya seeks review of a decision of the circuit court, acting in its appellate capacity, reversing a county

court order which granted a motion to suppress three video tapes allegedly illegally seized by the Collier County Sheriff's Department. We grant the petition and issue the writ.

After obtaining a card from Miragaya's store authorizing the rental of video tapes for a twenty-four hour period, two undercover officers entered a back room and randomly selected three video tapes. The officers viewed the three tapes at the Sheriff's Department and made copies. The officers did not make an independent determination that the tapes were obscene, but copied them to preserve evidence to be presented to the state attorney for possible charges. The officers returned the tapes to the store within the twenty-four hour rental period. Subsequently, Miragaya was charged with "Possession of Obscene Motion Film" and "Possession with Intent to Sale/Deliver [sic] an Obscene Motion Film," in violation of section 847.011(1)(a), Florida Statutes (1991).

In his motion to suppress, Miragaya asserted that by copying the video tapes the officers significantly interfered with his possessory rights in the tapes, the warrantless seizure of the tapes violated his rights under the Fourth Amendment to the Constitution of the United States, and the seizure of the tapes prior to a judicial determination that they are obscene results in significant prior restraint to his rights under the First Amendment to the Constitution of the United States. The county court agreed and entered an order granting the motion to suppress the "illegally seized" video tapes.

The circuit court, acting in its appellate capacity, reversed the county court's order and remanded, finding that the county court failed to consider Stall v. State, 570 So. 2d 257 (Fla. 1990), cert. denied, 501 U.S. 1250, 111 S. Ct. 2888, 115 L. Ed. 2d 1054 (1991). According to the circuit court, the Stall case is dispositive as it stands for the proposition that there is no right to privacy under the Florida Constitution for a commercial vendor of obscene materials. Id. at 259.

In an opinion on motion for clarification, the circuit court held that in the present case, there had been neither an illegal search, nor an illegal seizure, and thus no violation of the Fourth Amendment or the Florida Constitution. Reasoning that there had been no interference with the owner's possessory interest because the tapes had been timely returned, the court found that the owner "had voluntarily transferred to the deputy, as part of a commercial transaction, any possessory interest he may have had in the content of the tapes."

We disagree. To this court's knowledge, as of the date of this opinion, the video tapes which are at the center of this controversy have never been examined by a neutral magistrate to determine if they are obscene. It appears that the sheriff is attempting to circumvent the requirement that there be an obscenity determination by a judicial officer of any item which is subject to First Amendment protection prior to its seizure. See Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

We hold that the officer's act of copying the rented video tapes constitutes a seizure of Miragaya's property. While it is true that law enforcement officers are allowed to keep a single copy of a video tape or movie for purposes of preserving the evidence; see Johnson v. State, 605 So. 2d 545, 548 (Fla. 2d DCA 1992), the lawful retention is dependent upon the issuance of a warrant for the seizure of the item prior to the officers obtaining it. Only when a warrant has been issued is the retention not a prior restraint. See New York v. P.J. Video, Inc., 475 U.S. 868, 873-74, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986); Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).

The copying of the movie onto a blank cassette for the purpose of pursuing a prosecution for distribution of obscene materials without the determination that the movie is obscene is an illegal seizure even when the original cassette is returned to the store owner during the rental period. It is inconsequential whether the cassette which contains the movie belongs to the store owner, or whether the

law enforcement officers have purchased a blank cassette onto which the movie has been copied: the item that the store possesses is the thing that is copied onto the tape: the movie.

The circuit court has violated a clearly established principle of law by approving the seizure of items which are subject to First Amendment protection without the prior determination by a neutral magistrate that such items are obscene. Accordingly, we grant the petition, issue the writ, quash the circuit court opinion, and approve the county court's order suppressing the video tapes.

DANAHY and LAZZARA, JJ., Concur.

Supreme Court of Florida

FRIDAY, JUNE 23, 1995

STATE OF FLORIDA,	*	
	*	
Petitioner,	*	CASE NO. 85,662
	*	
v.	*	DISTRICT COURT OF APPEAL,
	*	2ND DISTRICT NO. 94-03020
CARLOS MIRAGAYA,	*	
	*	
Respondent.	*	
	*	
	*	

This cause having heretofore been submitted to the Court on jurisdictional briefs and portions of the record deemed necessary to reflect jurisdiction under Article V, Section 3(b), Florida Constitution (1980), and the Court having determined that it should decline to accept jurisdiction, it is ordered that the Petition for Review is denied.

No Motion for Rehearing will be entertained by the Court. See Fla. R. App. P. 9.330(d).

OVERTON, SHAW, KOGAN, HARDING and WELLS, JJ., concur

A True Copy

TEST

Sid J. White
Clerk, Supreme Court

BH

cc: Hon. William A. Haddad, Clerk
Hon. Dwight E. Brock, Clerk
w/copy to Circuit Judge

Ms. Susan D. Dunlevy
Mr. Robert J. Krauss
Mr. Donald P. Day

Supreme Court, U. S.
F I L E D
OCT 19 1995
CLERK

No. 95-504

In The

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

vs.

CARLOS MIRAGAYA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

DONALD P. DAY
Counsel of Record
BERRY & DAY, P.A.
Attorneys for Respondent
2671 Airport Road South
Suite 301
Naples, Florida 33962
(941) 775-2255

7616
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

15 pp

QUESTION PRESENTED

Was the decision of the Second District Court of Appeal and the Florida Supreme Court consistent with this Court's holding in *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985).

LIST OF PARTIES

Petitioner is the State of Florida, represented by Susan D. Dunlevy, Assistant Attorney General, Department of Legal Affairs, 2002 North Lois Avenue, Suite 700, Tampa, Florida 33607-2366.

Respondent is Carlos Miragaya, an individual, whose address is 2540 39th Street S.W., Naples, Florida 33964. Respondent is represented by Donald P. Day, Esquire, Berry & Day, P.A., 2671 Airport Road South, Suite 301, Naples, Florida 33962.

TABLE OF CONTENTS

	Page
Question Presented	i
List of Parties	ii
Table of Contents	iii
Table of Citations	iii
Statement of the Case	2
Summary of Argument	4
Reasons for Denying the Writ	5
Conclusion	9

TABLE OF CITATIONS

Cases Cited:

Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973) 5, 8

Katz v. United States, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) 7

Maryland v. Macon, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985) ..... i, 4, 5, 6

New York v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973) 4

Contents

Page

New York v. P.J. Video, 475 U.S. 868, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986) 4, 8

Roaden v. Kentucky, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973) 4, 5, 8

Stall v. State, 570 So. 2d 257 (Fla. 1990), *cert. denied, sub nom.* 3

Statutes Cited:

17 U.S.C. § 107 9

Florida Statute § 847.011(1)(a) (1991) 2

United States Constitution Cited:

First Amendment 3, 4, 5, 6, 8, 9

Fourth Amendment 3

No. 95-504

In The

Supreme Court of the United States

October Term, 1995

STATE OF FLORIDA,

Petitioner,

vs.

CARLOS MIRAGAYA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

TO THE HONORABLE SUPREME COURT:

The Respondent, Carlos Miragaya, respectfully requests this Court deny the Petition for a Writ of Certiorari submitted by the Petitioner, State of Florida.

STATEMENT OF THE CASE

The case at bar arose when Respondent was charged with six misdemeanor counts of distribution and three counts of possession with intent to distribute obscene material in violation of § 847.011(1)(a), Florida Statutes (1991). Respondent was charged after two undercover Collier County Sheriff's Deputies went to the Respondent's business, C & M Home Video, and rented three video tapes. The undercover deputies travelled to the Respondent's business after complaints about "dirty movies". Upon arrival, the undercover officer rented three movies for a period not to exceed twenty-four hours. The undercover officers then took the videos to the Collier County Sheriff's Department where they viewed the material.

Collier County Sheriff's Detective Ron Myers and the other officers involved made a determination that the video material was obscene and proceeded to make two copies of each of the three video tapes, giving one copy to the State Attorney's Office, and the other copy stayed at the Collier County Sheriff's Office. The video tapes were copied for use as evidence in future proceedings based on the determination by Collier County Sheriff's Department detectives that the material was obscene. After review of the material by Assistant State Attorney William Dearborn, he also reached a conclusion that the video-taped materials were obscene and charged the Respondent with the criminal complaint. In response to this complaint, the Respondent removed the video tapes from the shelves.

Petitioner's Statement of the Case omits relevant facts regarding the question of whether Respondent had removed the video tapes in issue from the shelves for fear of further prosecution. Petitioner alleges that there was "no evidence" offered in the original hearing that the Respondent had removed the video tapes in issue from the shelves for fear of further

prosecution. Petitioner cites Transcript, page 24, to support her claim. Directly contrary to this assertion, the Record reflects that there was a stipulation by the prosecution in the original evidentiary hearing that the Respondent, Carlos Miragaya, had removed the three video tapes from the shelves of his store and that they had not been rented from the time he was served with the original criminal complaint. (T., pp. 12-13). Subsequent to the filing of criminal charges, Respondent filed a motion to suppress the physical evidence, arguing that the warrantless seizure by law enforcement violated the First and Fourth Amendments to the United States Constitution and the Florida Constitution. The trial court granted the Respondent's motion to suppress, finding that the officers' actions violated the Respondent's reasonable expectation of privacy in the video material and that the Collier County Sheriff's Office and the State Attorney's Office had ignored the rigorous procedural safeguards established by this Honorable Court before explicit materials could be seized as obscene.

The state appealed to the Circuit Court, which held that there had been neither an illegal search nor a seizure, because obscene material was not protected. The court relied on the case of *Stall v. State*, 570 So. 2d 257 (Fla. 1990), *cert. denied sub nom.*

Respondent filed a Petition for Writ of Certiorari to the Second District Court of Appeal after the Circuit Court's opinion was issued. The District Court of Appeal agreed with the position taken by the Respondent that the Collier County Sheriff's Office was attempting to circumvent the requirements that there be an obscenity determination by a judicial officer before material protected by the First Amendment could be seized. The court acknowledged that while it is true that law enforcement officers are allowed to keep a single copy of a video tape or movie for purposes of preserving the evidence, the lawful retention is dependent upon the issuance of a warrant for the seizure of the

item *prior* to the officer's obtaining it. The District Court of Appeal reversed the Circuit Court's opinion and the Petitioner filed a Petition for Writ of Certiorari to the Florida Supreme Court. The Florida Supreme Court refused to accept the Writ of Certiorari. The Petitioner then filed another Petition for Writ of Certiorari to this Honorable Court requesting relief.

SUMMARY OF ARGUMENT

I. The Petition for a Writ of Certiorari fails to demonstrate an important reason for granting review. The Petitioner has failed to establish that the Florida Supreme Court's decision involves a federal question that is in conflict with the decision of any other state court of last resort. Secondly, the Petition for Writ of Certiorari fails to make any argument that would suggest that the decision by the Florida Supreme Court is in conflict in any way with any other state or of a United States Court of Appeals. Thirdly, the Petition for Writ of Certiorari does not argue that the Florida Supreme Court decided an important question of federal law which has not been addressed and should be settled by this Honorable Court. Finally, the Petition for Writ of Certiorari does not establish that the decision by the Florida Supreme Court conflicts with any other decision of this Honorable Court.

II. This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Petitioner's Writ of Certiorari only challenges the Circuit Court's interpretation of *Macon.*

III. Law enforcement may not seize material protected by the First Amendment to the United States Constitution and the Florida Constitution without the issuance of a warrant signed by a neutrally detached magistrate. *Roaden v. Kentucky,* 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *New York v. P.J. Video,* 475 U.S. 868, 873-874, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986);

Heller v. New York, 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973).

IV. Owners of video rental businesses have a reasonable expectation of privacy that customers will not take the video material that is rented on a temporary basis and copy the material, thereby diminishing the owner's future potential rental value in the material.

V. The Collier County Sheriff's Department and the State Attorney's Office attempted to circumvent the requirement that there be an obscenity determination by a judicial officer of any item which is subject to First Amendment protection prior to its seizure. *Roaden v. Kentucky*, 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973).

REASONS FOR DENYING THE WRIT

I.

This case presents no issue appropriate for the Court's exercise of its discretionary jurisdiction. Petitioner's Writ of Certiorari merely challenges the Second District Court of Appeal's interpretation of *Maryland v. Macon*, 472 U.S. 463, 105 S. Ct. 2778, 86 L. Ed. 2d 370 (1985). Petitioner's Writ of Certiorari asserts that the decision in *Macon* will allow law enforcement to seize First Amendment material where there has been *no transfer of ownership* in the material.

Contrary to arguments set forth in the Petition for a Writ of Certiorari, this Honorable Court's opinion does not address the issue of whether police may copy material that has not been given to them to keep. *Macon* only addressed issues concerning the *transfer* of ownership in the material that was purchased by the officer. There was no discussion in *Macon* that the same rule of

law would apply to the owner of material who temporarily allowed a second party to review the material, with the owner expressly reserving a possessory right in the material.

In *Macon,* undercover officers purchased the material and this Honorable Court found that there was a transfer of ownership removing any reasonable expectation of privacy in the material that the original owner may have had. The Second District Court of Appeal correctly found that *Macon* was distinguishable. The District Court found that it was obvious that the Collier County Sheriff's Department and the State Attorney's Office were attempting to circumvent the procedural safeguards established by this Court before First Amendment material could be seized by law enforcement. The decision of the Second District Court of Appeal, later affirmed by the Florida Supreme Court, was made in accordance with long-standing, well-established law set by this Court with reference to First Amendment material.

Petitioner is correct in recognizing the legal proposition established in *Maryland v. Macon,* that a "seizure occurs when there is some meaningful interference with an individual's possessory interest in the property seized". 472 U.S. at 469, 86 L. Ed. 2d at 470. In the instant case, there were two significant interferences with the Respondent's possessory interest in the property seized by the Collier County Sheriff's Department. First, it is entirely reasonable to presume that owners of video stores have a reasonable expectation that customers will not rent the video-taped material and copy tapes for their own use later. Renters of video material clearly expect that the customers will pay them to temporarily possess the materials so that it can be viewed. If owners of video rental stores expect all of their customers to rent the material and copy the material for later use, there would be little need for a video rental business. Secondly, as the stipulation entered into between the state and the defense in the original proceedings (*see* Transcript, page 12) indicated, the

Respondent immediately removed the original tapes from the shelves, anticipating that the continued rental of the material would be an additional violation of Florida law. Therefore, the state's decision in charging the Respondent based on the material that had been previously copied significantly interfered with the Respondent's possessory interest and property rental value.

II.

The Petition for Writ of Certiorari filed before this Honorable Court argues that the Respondent failed to demonstrate standing to argue a copyright infringement claim and that federal copyright laws *may* allow copying of the rented material. The question involving the seizure of the material in the instant case is not whether federal copyright laws have been violated, the question is whether the Respondent believed that he had an expectation of privacy in the material he rented that potential customers would not copy the rented material for their own use. This Honorable Court has recognized on many occasions that the question of whether a seizure has occurred will fall on whether there has been a seizure that has interfered with the reasonable expectation of privacy that the individual had in the material and secondly, that expectation is one that society is prepared to recognize. *Katz v. United States*, 389 U.S. 347, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967). Clearly, owners of video rental businesses do not expect their customers to copy the material that they rent for distribution and use at some later date. If owners of video store businesses expected the customers to copy all of the material they rented, there would be no need for a rental business. Owners of video rental materials make their money from the continuous rental of the materials. On the second question, if society is not willing to recognize the private property rights of individuals in rented, written or audio material, there would not be a copyright law protecting the materials. Clearly, society and the government recognize the need to protect the printed and

audio materials from illegal reproduction. It is inconceivable that the Petitioner can argue that the Respondent did not have a reasonable expectation of privacy in his rented video material that the material would not be rented and illegally reproduced for use in any manner. The question involved here is not whether federal copyright laws would have allowed some individual to copy the video-taped materials found in the Respondent's store. The question is whether the reasonable proprietor of such a business would believe that renters are not authorized to copy the materials found in their stores. Respondent would further assert that the issue of whether the materials found in video rental stores could be copied by law enforcement is unclear. Therefore, the owner's belief that the materials may not be copied is reasonable.

III.

Petitioner argues that the "Fair Use Doctrine" would allow the seized material in the instant case to be used as evidence. Petitioner's claim completely ignores this Honorable Court's judicial opinions over the past twenty years concerning the danger of allowing law enforcement and prosecutors to reach a determination about arguable First Amendment material without seeking review by a neutrally detached magistrate. *Roaden v. Kentucky,* 413 U.S. 496, 93 S. Ct. 2796, 37 L. Ed. 2d 757 (1973); *New York v. P.J. Video,* 475 U.S. 868, 873-874, 106 S. Ct. 1610, 89 L. Ed. 2d 871 (1986); *Heller v. New York,* 413 U.S. 483, 93 S. Ct. 2789, 37 L. Ed. 2d 745 (1973). This Honorable Court has been unwavering in its position that material that is protected by the First Amendment to the United States Constitution will receive special protection that is not afforded to other potential contraband material. That special protection includes specific precautions that must be taken by law enforcement before seizure of the material or restraints on the distribution of the material may occur. If this Court were to accept the position taken by the Petitioner, law enforcement would no longer be required to seek

seek any neutral judicial determination about the status of arguable First Amendment material before seizure. The Fair Use Doctrine found in 17 U.S.C. § 107 was not established to allow law enforcement a loophole to avoid review by a neutrally detached magistrate before seizing potential First Amendment material.

CONCLUSION

Accordingly, for all the foregoing reasons, Petitioner's request for a Writ of Certiorari should be denied.

Respectfully submitted,

DONALD P. DAY

Counsel of Record
BERRY & DAY, P.A.
Attorneys for Respondent
2671 Airport Road South
Suite 301
Naples, Florida 33962
(941) 775-2255